Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ALDERIC JENSEN SR PRO SE-PETITIONER
DORIS JENSEN PRO SE
(Your Name)

VS.

COUNTY OF LOS ANGELES-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE CALIFORNIA SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE).

PETITION FOR WRIT OF CERTIORARI

ALDERIC JENSEN SR.
DORIS JENSEN

5922 ARBOL DRIVE

DEL RAY BEACH, FLORIDA 33484

407-495-7116

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I

QUESTION PRESENTED

Should Certiorari Issue:

(A) Where The California Supreme Court correct when they DENIED WITHOUT OPINION, DID THEY WRONGLY DENY; AND

(B) WHERE THE CALIFORNIA SUPREME COURT ERRONEOUSLY DENIED TO THE EXTENT THAT THE CALIFORNIA LAW VIOLATES THE PETITIONER EQUAL RIGHTS AND DUE PROCESS UNDER THE FEDERAL UNITED STATES CONSTITUTION; IN THAT IT DISCRIMINATES UNFAIRLY AND WITHOUT RATIONAL BASIS BETWEEN PARENTS OF DECEDENT WHO LIVE IN CALIFORNIA AND PARENTS OF DECEDENT WHO RESIDE OUTSIDE OF CALIFORNIA, DEPRIVING SUCH NON_ RESIDENTS OF REASONABLE NOTICE. YOU AS A CITIZEN OF THE UNITED STATES OF AMERICA ARE BEING TREATED DIFFERENT WITHOUT A RATIONAL BASIS FOR DOING IT. THE FACT YOU DO NOT LIVE IN STATE DOES NOT REMOVE YOUR RIGHT TO DUE PROCESS. IF YOU FIND A PARENTS ADDRESS IN CALIFORNIA SHOULDN'T YOU BE OBLIGATED TO SEND NOTICE TO NOTIFY PARENTS IN THE OTHER STATES. SENDING A LETTER TO NORTH PROVIDENCE, RI, OR TO A CALIFORNIA ADDRESS IS THE SAME COST AND HAS NO BASIS AND VIOLATED OUR CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION AND DUE PROCESS.

II

LIST OF PARTIES TO THE PROCEEDING IN THE CALIFORNIA SUPREME COURT

1. Alderic Jensen, Sr. and Doris Jensen
   Plaintiffs and Appellants, In Pro Se

2. County of Los Angeles
   Defendant and Respondent

3. Martin Roy Robles
   Attorney for Defendant

4. Daniel Lungren, Attorney General of the
   State of California

5. Peter Wilson, Governor State of California

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Petitioner challenges the Decision of the California Supreme Court to be repugnant to a portion of Section 1 of the 14th Amendment to the Constitution of the United States, to wit:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

_____

No._____

_____

ALDERIC JENSEN SR. PRO SE

DORIS JENSEN PRO SE

PETITIONER,

v.

COUNTY OF LOS ANGELES

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF CALIFORNIA

_____

OPINIONS BELOW

The opinion of the Supreme Court of the State of California which is in direct controversy, Alderic Jensen, Sr. and Doris Jensen v. County of Los Angeles, et al.,_____A2d_____(CA Slip Op. August 21, 1996) is reprinted herein as **Appendix C.**

The Judgment of the Superior Court dated May 5, 1994 is reprinted as **Appendix B.**

The Judgment of the State of California Second Appellate District is reprinted as **Appendix A.**

JURISDICTION

Jurisdiction of the Court is invoked pursuant to

28 U.S.C. 1257 (a). This Petition seeks review, by way of issuance of a writ of certiorari, of a decision of the Supreme Court of the State of California entitled Alderic Jensen, Sr. and Doris Jensen v. County of Los Angeles, et al.,_____A.2d _____ (Ca. Slip Op. August 21, 1996) (attached as **Appendix C**).

STATEMENT OF THE CASE

On or about January 22, 1990, Alderic R. Jensen, Jr. died in an accident in his apartment on Hudson Street in Los Angeles, State of California.

On or about March 16, 1990, County of Los Angeles, (hereinafter defendant) willfully interfered with the right of Plaintiffs to dispose of and inter the remains of the decedent by failure to notify Plaintiffs of decedent's death, failure to ascertain Plaintiffs wishes as to the disposal and burial of decedent's remains; which were all done contrary to the wishes and beliefs of Plaintiffs.

Such interference was wilfull in that decedent had adequate documentary identification on his person and other unique physical features so that defendants was able to appraise Plaintiffs of decents' demise and ascertain their wishes as to the disposal and burial of Decedents remains.

Defendants disposal of the decedents body is and was repugnant, offensive and insulting to Plaintiffs and their beliefs and learning of defendants disposition of decendents' body; and thereafter, caused Plaintiff extreme mental anguish and disgust and disturbed their peace of mind, causing them to become permanently sick in mind and body.

On or about January 21, 1991, Alderic R. Jensen, Sr. and Doris Jensen (hereinafter plaintiff), filed a petition in Superior Court of the State of California for the County of Los Angeles.

Plaintiffs are the parents of Alderic Raymond Jensen Jr. hereinafter referred to as "decedent". By reason of the relationship of Plaintiffs and decedent, Plaintiffs were at all times herein mentioned entitled to immediate custody and possession of the decedent's remains.

On January 8, 1993, at a status conference, trial was set for April 19, 1993. It was subsequently reset to a date in March, 1994.

On March 4, 1994 defendant, County of Los Angeles, motion for Judgement on the Pleading was heard in Department "55" of the Los Angeles Superior Court, Judge Joseph R. Kalin presided. At this hearing Judge Joseph R. Kalin stated that reasonable diligence to find family members for notification of death ends at state lines, and even if, as I said before, they found an address for somebody in another state, I don't believe the stature puts a duty on them to go outside of the state and look for somebody even if they have reason to suspect or know that somebody who has the right to inter, such as the parents here, could be located, Plaintiff believes the above statement by the trial Judge erred in his interpretation of California law. This violates the Plaintiffs rights to due process and equal right protection by the United States Constitution.

The "decedent" was an Army Veteran who was honorably discharged and had on his person a veteran identification

card. He was entitled to a military funeral and burial in a Veterans cemetery. He was a Veteran of the United States Army whose duty was to protect and uphold the Constitution of the United States. Yet, in his death in Los Angeles, his parents rights protected by the United Stataes Constitution to equal right and due process were denied without rational basis.

On or about June 7, 1994 an appeal was filed in Court of Appeal Second Appellate District by Plaintiff.

Appeal from judgement of the Superior Court of Los Angeles County, Joseph R. Kalin Judge was Affirmed. The Court of Appeal of the State of California Second Appellate District concurred with the lower court and restated that the Los ANgeles County was not required to go beyond (state lines to notify the decedent's next of kin). Plaintiffs challenges this decision of the court to be repugnant to a portion of Section 1 of the 14th Amendment to the Constitution of the United States. to wit: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

On July 17, 1996, Plaintiff filed an appeal with the Supreme Court of the State of California. The Petition for review was Denied by the California Supreme Court. Plaintiff challenges the decision of the California Supreme Court to be repugnant to a portion of Section 1 of the 14th Amendment to the Constitution of the United States, to wit.

states, to wit.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASON FOR ALLOWING THIS REQUEST FOR ISSUANCE OF A WRIT OF CERTIORARI

The jurisdiction of the United States Supreme Court traditionally attachs when the highest court of a state affirms or denies the validity of a judgement of an inferior court on appeal provided that a federal question is involved. Williams V. Bruffy, 102 U.S. 248, 26 L. ED.135 (1880).

In the present case, the highest state Court in California, on appeal denied Plaintiff a review and subsequently affirmed the decision of an inferior trial court based squarely upon a crucial question of Federal constitutionality. In cases such as this where there is a strong indication that judicial construction of the federal constitution controlled the state court decision, review by the United States Supreme Court is warranted, Michigan V. Long, 463 U.S. 1032, 103 S.CT 3469, 77 L.ED. 2nd 1201 (1983) on remand 417 Mich. 1145, later op,.413 Mich. 636, 359 N.W. 2d 194. THis procedure for review is in keeping with the proven practice of this court to look to the "real substance and effect" of the state court decision

in determining whether the matter is reviewable on Federal question grounds. See Mc Cullough V. Virginia, 172 U.S, 102, 19 S. CT. 134, 43 L. Ed. 382 (1898).

CERTIORARI SHOULD ISSUE ACCORDINGLY

Where the California Supreme Court correct when they denied without opinion, did they wrongfully denied and.

Where the California Supreme Cpurt erroneously denied to the extend that the California law violates the petitioners equal rights and due process under the Federal United States Constitution; in that it discriminates unfairly and without rational basis between parents of decedent who live in California and parents of decedent who reside outside of California. Depriving such non residents of reasonable notice you as a citizen of the United States of America are being treated different without a retional basis for doing it. The fact you do not live in state not remove your right to due process. If you find a parents address in California shouldn't you be obligated to send notice to notify parents in the other state. Sending a letter to North Providence, RI or to California address is the same cost and has no basis and violated our constitutional right of equal protection and due process.

Mr. Alderic Jensen, Jr. (hereafter decedent) was found in his apartment with numerous pieces of identification, his body was also identified by the apartment manager. The decedent was a veteran, he had his veteran's card on him, decedent had his social security card. Decedent had

a California I.D. No effort was made to contact the Division of Motor Vehicles with regard to who decedent had the next of kin listed as in his request for his or in his application for his California I.D.

With regard to decedent's social security number, he had that. No effort was made within the State of California, no reasonble diligence. Decedent also had a Rhode Island I.D. on him bearing his parents Rhode Island address. They were residents of Rhode Island. They still owned the Rhode Island home address that Decedent had in his possession when de died.

In fact, at that point in time when he died his brother, the brother of the decedent, lived in the family home in Rhode Island . No telephone records were attempted to be utilized by the county coroner's office, nothing was done. No reasonable diligence was exercised.

The defendants argued they did not have to look outside states lines. The decedent was a veteran. What right do verterans have within the United States? Doesn't the defendants County of Los Angeles a municipal corporation, duly organized and chartered under the laws of the State of California responsible for the hiring, training, and supervising the conduct, practices and policies of the employees and agents of the Defendant County of Los Angeles, and all its individual members have an obligation to notify next of kin when they discover a body in a persons own apartment have the decedent identification and refuse to notify family members because they live outside of state lines.

What kind of message does this law transmit? What if you are visiting California on vacation and are killed in an automobile accident or are attending a convention and suffer a fatal heart attack. Will the COunty of Los Angeles look at your identification and see you live in another state and say, wall, they live in the next of kin lives in Texas, we verified that by identification, there is nothing for us to do. The County doesn't have to send one letter, they don't have to make one telephone call. This violates, the Equal Protection Clause of both the California Constitution and the United States Constitution. The rights of citizens in general or generalized statues.

The California law violates the petitioners equal rights and due process under the Federal United States Constitution, in that it discriminates unfairly and without rational basis between parents of decedent who live in California and parents of decedent who reside outside of California. Depriving such non-residents of reasonable notice. You as a citizen of the United States of America are being treated different without a rational basis for doing it. The fact you do not live in state does not remove your right to due process. If you find a parents address in California shouldn't you be obligated to send notice to notify parents in the other state. Sending a letter to North Providence, Rhode Island or to a California address is the same cost and has no basis and violated our Constitutional rights of equal protection and due process. Think of the chaos and confusion if all states were allowed to adopt California law. How many

other families will have to endure the heartbreak of knowing a family member died and the County of Los Angeles states it is not their obligation to notify next of kin because you didn't live within the state lines of California.

The application of the California Supreme Court's opinion unjustifiably divests the Plaintifff of their due process and equal protections guaranteed by the 5tH and 14th Amendments of the United States Constitution. Certiorari should issue accordingly.

CONCLUSION

In this case, both the Supreme Court for its denial and Superior Courts of the Statae of California improperly declared a state law constitutional based directly upon faulty interpretation of the law.

Where, as here, a state court restricts the rights of due process and equal protection of a citizen protected by the United States Constitution in that it discrminates unfairly and without rational basis between parents of decedent who lives in California and parents of decedent who reside outside California.

For these and all of the reasons stated herein, the Plaintiff request issuance of a writ of certiorari bring the federal issues created by the erroneous opinion of the California Supreme Court in ALderic Jensen, Sr. and Doris Jensen V. County of LOs Angeles directly before this court.

Respectfully submitted,

Alderic A Jensen

ALDERIC JENSEN, SR.
PETITIONER PRO SE

5922 ARBOL DRIVE
DEL RAY BEACH, FL 33484

Doris Jensen

DORIS JENSEN
PETITIONER PRO SE

5922 ARBOL DRIVE
DEL RAY BEACH, FL 33484

November 12, 1996

Presented by:

s/ ARJ, DJ

ALDERIC JENSEN, SR.

DORIS JENSEN

5922 Arbol Drive

Del Ray Beach, FL 33484

407-495-7116

CERTIFICATION

TO: Martin Roy Robles
Martine Roy Robles & Associates
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Dan Lungren
Attorney General of the State of California
300 S. Spring STE. 500
Los Angeles, California 90013

Peter Wilson, Governor State of California
State Capitol Building
1ST Floor
Sacramento, California 95814

I hereby certify that I mailed a true copy of the within Order to the above-named counsel on the 14th day of November, 1996

s/ DORIS JENSEN

/dj

APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALDERIC JENSEN, SR., ET AL.,

Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

B084952

(Super. Ct. No.BC019538)

COURT OF APPEAL - SECOND DIST.
FILED
JUN 19 1996
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph R. Kalin, Judge. Affirmed.

William P. Imperial for Plaintiffs and Appellants.

Martin, Roy, Robles & Associates and Steven W. Hashimoto for Defendant and Respondent.

A-2

INTRODUCTION

Appellants Alderic Jensen, Sr. and Doris Jensen (the Jensens) appeal after the trial court granted the motion for judgment on the pleadings of respondent County of Los Angeles (the County).[1] The Jensens, parents of Alderic Jensen, Jr., had alleged the County violated a duty owed to them when it cremated the body of their son.

The arguments on appeal involve whether the County owed a duty to the Jensens and whether the County breached any such duty. We conclude the Jensens cannot state a cause of action based upon the common law tort of interference with the deceased because the County is a governmental entity. We also find there can be no liability pursuant to Health and Safety Code sections 7200 and 7104 because these sections were not designed to prevent the harm alleged and any negligence from these statutes did not cause the harm to the Jensens. Lastly, we conclude the trial court did not abuse its discretion in refusing to allow the Jensens to amend their pleadings. We affirm

FACTUAL AND PROCEDURAL BACKGROUND[2]

The Jensens filed a complaint for damages, naming the County as the defendant.[3] The complaint alleged the following. The Jensens timely filed a governmental claim.

---

1 After the motion was granted, the County was ordered to file a judgment. While the County submitted an order granting the motion for judgment on the pleadings, which has been signed and filed by the trial court, it did not submit or file a judgment. In order to promote judicial economy and substantial justice, we deem the order to include a judgment in favor of the County and treat the notice of appeal prematurely filed to be a notice of appeal from this judgment. We proceed to the merits. (*In re Elaine E.* (1990) 221 Cal.App.3d 809, 813.)

2 The matter comes to us upon the granting of a motion for judgment on the pleadings. Thus, we accept as true all facts in the complaint, as well as all facts of which the court may judicially notice. (*Ott* v. *Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1447-1448; *Evans* v. *California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548-549.)

3 The complaint also was filed by the deceased's siblings, Allen Jensen, Douglas W. Jensen, Robert Jensen, Linda Bessette, Cheryl Maddaliena and Jeffrey Jensen. It appears the trial court granted a summary judgment motion in favor of the County, ruling these persons had no standing. They do not appear as parties on appeal.

The Jensens' son, Alderic Raymond Jensen, Jr. died, on January 22, 1990 in Los Angeles. The Jensens were entitled to custody and possession of the remains of their son. On March 16, 1990 the County willfully interfered with the Jensens' right to dispose of and inter the remains of their son by cremating his body before notifying them of his death. "Such interference was willful in that decedent had adequate documentary identification on his person and other unique physical features so that defendant was able to [apprise the Jensens] of [decedent's] demise and ascertain their wishes as to the disposal and burial of Decedent's remains." The Jensens were damaged because the disposal of decedent's body was offensive and insulting to them.

On January 8, 1993, at a status conference, trial was set for April 19, 1993. It was subsequently reset to a date in March 1994.

On February 17, 1994, the County filed a motion for judgment on the pleadings. The County contended the complaint was barred by Health and Safety Code section 7104, interment by coroner. The County attached the Jensens' verified interrogatory responses in which they admitted they resided in Florida. The County argued that since the Jensens resided in Florida, they had no standing to bring the lawsuit.

On February 25, 1994, the Jensens objected to the motion for judgment on the pleadings. They argued the motion was untimely under Code of Civil Procedure section 438, subdivision (e). They also argued Health and Safety Code section 7104 required the County, before cremating their son, to use reasonable diligence to locate them and there was a question of fact as to whether the County had exercised that diligence. They stated "with the exception of sending one letter to the Veterans Administration it is alleged that no other efforts were made by [the County] and therefore [the County cannot] realistically argue that reasonable diligence was exercised prior to the disposition of the decedent's

remains by [the County]." Further, if the court was inclined to grant the motion, the Jensens argued they should be given leave to amend.[4]

On March 3, 1994, the County filed supplemental papers.

At the hearing on the motion on March 4, 1994, the Jensens admitted the decedent had not made any provisions for his demise or his interment. They also admitted that due to the circumstances of the decedent's death, an autopsy was performed. In an offer of proof, the Jensens stated that at the time of his death, the decedent had on him a veteran's card, a California identification card and a Rhode Island driver's license. They argued the County's single written inquiry to the Veterans Administration was negligent in that it contained an incorrect social security card number and that had contacts been made to the California Department of Motor Vehicles or the State of Rhode Island, the County would have discovered his next of kin. Further, it was represented to the court that since the decedent had a criminal record, a CII check would have produced his relatives.

On March 4, 1994, the trial court granted the motion for judgment on the pleadings and ordered the County to prepare and submit a judgment. The trial court reasoned that since there was no one in California who had the right of interment, it would have been futile for the County to have searched for anyone in the state, and the County's mandated responsibilities pursuant to section 7104 were only to search for relatives within California.

On May 5, 1994, the order granting the motion for judgment on the pleadings without leave to amend prepared by the County was filed.

On June 7, 1994, the Jensens filed a notice of appeal.

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[4] The declaration of Jensens' attorney was attached to the opposition papers. He declared in response to discovery the County had stated its only efforts to locate relatives of decedent was sending one letter to the Veterans Administration. A one page "request for eligibility and information" document directed to the Veterans Administration was also attached to the opposition papers.

DISCUSSION

1. *Standard of Review.*

"Review of a judgment on the pleadings requires the appellate court to determine, de novo and as a matter of law, whether the complaint states a cause of action. [Citation.]" (*Ott* v. *Alfa-Laval Agri, Inc.*, *supra*, 31 Cal.App.4th at p. 1448.) "The grounds for a motion for judgment on the pleadings must appear on the face of the challenged complaint or be based on facts which the court may take judicial notice. [Citations.] . . . 'A judgment on the pleadings admits the truth of all material facts alleged in the complaint.' [Citation.]" (*Evans* v. *California Trailer Court, Inc.*, *supra*, 28 Cal.App.4th at pp. 548-549.) In reviewing a judgment on the pleadings, courts may "take judicial notice of something that cannot reasonably be controverted, even if it negates an express allegation of the pleading. [Citation.]" (*Id.* at p. 549.) Thus, courts may accept as true admissions and concessions by plaintiffs if they cannot be controverted. (*Ibid.*; *Columbia Casualty Co.* v. *Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 468, 469.)

2. *The trial court did not err in considering and ruling on the motion for judgment on the pleadings.*

The Jensens contend the trial court could not rule on the motion for judgment on the pleadings because it was untimely. However, Code of Civil Procedure section 438, subdivision (e) limits such motions to "within 30 days of the date the action is initially set for trial . . . unless the court otherwise permits."[5] By considering the motion, the trial court permitted it to be heard, a decision authorized by this section.

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[5] Code of Civil Procedure section 438, subdivision (e) reads: "No motion [for judgment on the pleadings] may be made pursuant to this section if a pretrial conference order has been entered pursuant to Section 575[, judicial council may promulgate pretrial conference rules,] or within 30 days of the date the action is initially set for trial, whichever is later, unless the court otherwise permits."

3. *The trial court did not err in granting the motion for judgment on the pleadings.*

a. *There is no common law cause of action against the County for interference with the disposition of a decedent's body.*

The Jensens contend, as the parents of the decedent, they had the right to dispose of the remains of their son and they stated a common law cause of action for interference with the disposition of a decedent's body.[6] This contention is not persuasive.

Government Code section 815, subdivision (a) states, "Except as otherwise provided by statute: [¶] (a) A public entity is not liable for injury, whether such injury arises out of an act or an omission of the public entity or a public employee or any other person." This statute "abolished all common law liabilities or judicially declared forms of liability." (Cal. Gov. Tort Liability Practice (Cont.Ed.Bar 1992) § 2.8, p. 77 (hereinafter cited as CEB).) Thus, even though there is a common law tort for interference with the right of disposition of a decedent's remains, which may be asserted against individuals and private entities, (e.g., *Christensen* v. *Superior Court* (1991) 54 Cal.3d 868; *Ross* v. *Forest Lawn Memorial Park* (1984) 153 Cal.App.3d 988; *Sinai Temple* v. *Kaplan* (1976) 54 Cal.App.3d 1103; *Spiegel* v. *Evergreen Cemetery Co.* (N.J. 1936) 186 A. 585, 117 N.J.L. 90) no such cause of action can be made against the County, a public entity. (Compare, *Finn* v. *City of New York* (70 Misc.2d 947, 335 N.Y.S.2d 516, revd. on other grounds in 76 Misc.2d 388, 350 N.Y.S.2d 552 [New York permits suit against public entity].)

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[6] Health and Safety Code section 7100 provides in part: "(a) The right to control the disposition of the remains of a deceased person . . . vests in, and the duty of interment . . . devolves upon the following in the order named: [¶] (1) The surviving spouse. [¶] (2) The surviving child or children of the decedent. . . . [¶] (3) The surviving parent or parents of the decedent."

b. *Health and Safety Code sections 7200, 7100 and 7104 do not impose liability on the County.*

Government Code section 815.6 permits liability against a governmental entity, when the duty is imposed by statute. (Gov. Code, § 815.6.) The Jensens contend Health and Safety Code sections 7200, 7100 and 7104 imposed a duty on the County to exercise reasonable diligence in searching for them. This contention is not persuasive.

In order for a statute to impose a duty upon a governmental entity, it must be a mandatory duty "designed to protect against the risk of a particular kind of injury." (Gov. Code, § 815.6.) Further, liability for a breach of a mandatory duty under the section arises only ". . . for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.) To find liability pursuant to Government Code section 815.6 all three elements must be met. There must be an enactment imposing a mandatory duty, the enactment must be intended to protect against the kind of risk of injury suffered by the individual asserting liability and the breach of the duty must be the cause of the injury suffered. (*Posey* v. *State of California* (1986) 180 Cal.App.3d 836, 848; CEB § 2.80, p. 156.)[7]

(1) Health and Safety Code section 7200.

Health and Safety Code section 7200 provides: "Every head of a public institution, city or county undertaker, or State, county, or city officer having charge or control of remains to be interred at public expense, shall use diligence to notify the relatives of the decedent. In the absence of any known relative of decedent desiring to direct the disposition of the remains in a manner other than in this chapter provided, and upon written request of the State department that such notices are required for a definite period specified in the request, such officer shall notify the State department by telegraph

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7 For purposes of discussion, we assume the statutes in issue here were mandatory.

collect, immediately after the lapse of twenty-four hours after death, stating, whenever possible the name, age, sex, and cause of death of the decedent."

This 1939 statute (Stats.1939, c. 60, § 7200, p. 67) is codified in chapter 4 of Division 7. It is the first in a series of statutes dealing with the disposal of human remains. (Gov. Code, §§ 7200-7206.) All derived from an 1870 enactment intended to prevent unclaimed bodies from being used in scientific research. (Supplement to Statutes 1869-1870, c. 304, §§ 1-5, p. 405.) The Jensens have not provided us with any authority to suggest the underlying purpose of this statute was changed when it was amended by the Legislature. (Stats. 1906, c. 445, §§ 1-4, p. 835; Stats. 1927, c. 623, §§ 1-8, pp. 1049-1051; Stats. 1935, c. 720, §§ 1-7, pp. 1944-1946; cf. 10 Ops.Cal.Atty.Gen. 73.)

Here, it is given the deceased's body was not used for scientific purposes, the underlying purpose of the statute. Since the harm here, the cremation without notification to the Jensens, was not the particular harm the statute was designed to protect against, the County cannot be held liable for its violation.

This conclusion is buttressed by *Bock* v. *County of Los Angeles* (1983) 150 Cal.App.3d 65 in which Division 5 of this District was faced with similar arguments, relating to other statutes which appeared to obligate the coroner to identify remains and notify relatives of a deceased. In *Bock* the plaintiff's husband was killed in an automobile accident on June 14, 1980. His body was transported to the county morgue. On June 23, 1980, his body was identified. However, the County failed to notify the plaintiff of this information until July 15, 1980, when the remains were released to her. The plaintiff identified numerous statutes to support her argument that the coroner breached its duty to her. Government Code section 27463, which obligated the coroner to keep an official register with information on deceased corpses, was held to only be a mandate to keep records; its purpose was not to identify the body nor to notify the decedent's next of kin. Government Code section 27471 directed coroners to take custody of bodies and to make

a reasonable attempt to locate families within 24 hours.[8] This section was found to pertain only to the coroner's authority to embalm, not to identify the body. Health and Safety Code section 10254 required coroners to use a dental examination to assist in the identification of the body, and forward information to the Department of Justice. This section was held to implement a nationwide search of deceased persons, to further expand the coroner's duty to keep records. "Beyond these specific duties, they create no general duty to identify deceased persons or to notify their families." (*Id.* at p. 70.) *Bock* concluded that all of these statutes were not designed to protect against the risk of the particular injuries alleged by the plaintiff. (*Id.* at p. 71.) (Accord, *Shelton* v. *City of Westminister* (1982) 138 Cal.App.3d 610 [investigation delays identifying victims of "freeway killer"; Pen. Code § 11114 which required law enforcement officers to obtain dental records from family and forward same to the Department of Justice enacted solely to aid coroner in criminal investigations even though it may have incidental benefits to relatives].)

Thus, even though there are many statutes which mention the coroner's responsibility to notify the decedent's next of kin, none impose a mandatory obligation which gives rise to a cause of action for doing so in a negligent manner.

(b) Health and Safety Code sections 7100 and 7104.

Health and Safety Code section 7100 outlines the persons who have the right to control the disposition of the remains of deceased persons. (See fn. 6 above.) As the parents of the decedent, the Jensens would have this right.

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[8] Government Code section 27471 in part reads: "(a) Whenever the coroner takes custody of a dead body pursuant to law, he or she shall make a reasonable attempt to locate the family. After a reasonable attempt, the coroner may embalm the body or authorize the embalming . . . Any family . . . which has not been located within 24 hours of the custody by the coroner of the body, shall not be charged more than sixty-five dollars ($65)."

Health and Safety Code section 7104 reads: "(a) When no provision is made by the decedent, or where the estate is insufficient to provide for interment *and the duty of interment does not devolve upon any other person residing in the state* or if such person cannot *after reasonable diligence be found within the state* the person who has custody of the remains may require the coroner of the county where the decedent resided at the time of death to take possession of the remains and the coroner shall inter the remains in the manner provided for the interment of indigent dead. [¶] (b) A county exercising jurisdiction over the death of an individual pursuant to Section 27491[9], or who assumes jurisdiction pursuant to Section 27491.55[10] of the Government Code, shall be responsible for the disposition of the remains of that decedent. If the decedent is an indigent, the costs associated with disposition of the remains shall be borne by the county exercising jurisdiction." (Fns. and italics added.)

This statute permits the coroner to inter the remains of a deceased in the manner provided for indigent dead. It also obligates a search using reasonable diligence to determine if a person can be found *in the state* to ascertain if the duty of interment rests with another.

Here, it is conceded the Jensens did not reside in this state. Thus, even if they had the right to control the disposition of the remains of their son, any violation by the County could not have been the cause of harm to them. The county's obligation under Health and Safety Code section 7104 was to search within the state. Had such a search been conducted, the Jensens still would not have been found.

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9 Government Code section 27491 requires coroners to determine the manner, circumstances, and cause of violent, sudden or unusual deaths.

10 Government Code section 27491.55 permits coroners to delegate its responsibilities under section 27491.

4. *There was no special relationship between the parties.*

The Jensens contend once the County undertook to make an investigation by sending the letter to the Veteran's Administration, it had an absolute duty to do so in a non-negligent manner. Since there was no special relationship between the Jensens and the County, even if the County undertook a negligent search, the County cannot be held liable to the Jensens.

Under the general rules of negligence, neither an individual nor a governmental entity has an obligation to aid another who has not put the other in peril. (*Williams* v. *State of California* (1983) 34 Cal.3d 18, 23; CEB § 2.26, pp. 96-97.) A governmental entity who has not created a peril, but who takes affirmative action to assist another may be liable if there is some relationship which gives rise to a duty to act. (*Ibid.*) Liability may be based upon an affirmative act or an omission or failure to act. However, if such liability exists it must be predicated upon either an express or an implied promise creating detrimental reliance or conduct which creates such reliance. (CEB § 2.26, at pp. 96-97; cf. *Stout* v. *City of Porterville* (1983) 148 Cal.App.3d 937, 943; e.g., *Mann* v. *State of California* (1977) 70 Cal.App.3d 773.)

Here, there are no acts, nor could there be any acts which created reliance by the Jensens upon the County. Assuming the County was negligent in not including the decedent's correct social security number on the notice to the Veterans Administration, the Jensens were unaware the County had acted. Thus, they could not have relied upon those acts and no liability arose. Unlike *Bock* v. *County of Los Angeles, supra,* 150 Cal.App.3d 65, where the wife had been assisting the coroner in its investigation by identifying other bodies, the Jensens had no contact with the County and thus was not relying upon it.[11]

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[11] Additionally, even if we accept the additional facts brought forth in the Jensens' offer of proof, this analysis does not change. If we assume the County was negligent in

5. The trial court did not err in denying the Jensens the right to amend.

The Jensens are correct in asserting plaintiffs are usually given an opportunity to amend upon the granting of a single motion for judgment on the pleadings. However, they have admitted they lived out of the state. This is an uncontroverted fact, which can not change and from which inferences need not be made. Thus, even if the Jensens were not obligated to show how they would have amended their complaint, there can be no facts which would change this result. (Compare with, *Bock* v. *County of Los Angeles, supra,* 150 Cal.App.3d 65; *Eldridge* v. *Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 779.)

While we sympathize with the despair suffered by any parent after learning about the death of their child, such anguish is not always actionable.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING , J.

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not making inquiries through the Department of Motor Vehicles or through the State of Rhode Island, the Jensens would not have relied upon such inquiry.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 3

Law Offices of
William P. Imperial
205 South Broadway
Suite 907
Los Angeles, CA. 90012

RE: Jensen, Alderic
vs.
Los Angeles, County of
2 Civil B084952
Los Angeles NO. BC019538

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 06/19/96 is now final.

* * Affirmed In Full. * *

Parties To Bear Own Costs.

JOSEPH A. LANE, Clerk

By: V Thomas

Deputy Clerk

AUG 26 1996

APPENDIX B

MARTIN ROY ROBLES & ASSOCIATES
Attorneys at Law
2120 Huntington Drive
South Pasadena, California 91030
818/441-0951
SBN: 159482

91D-635/JSW/byt

FILED
MAY 5 1994
[illegible] DENSEN, CLERK
ELVIA T. ESPINOZA, DEPUTY

Attorneys for: Defendant, County of Los Angeles

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[illegible], SR., et al.,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES, et al.

Defendants.

CASE NO. BC 019 838

ORDER [PROPOSED]

That on March 4, 1994, defendant, County of Los Angeles' Motion for Judgement on the Pleadings was heard in Department "58" of the Los Angeles Superior Court, Judge Joseph R. Kalin presiding. Plaintiffs, Alderic Jensen, Sr., et al., appeared by counsel, William P. Imperial of the Law Offices of William P. Imperial. Defendant, County of Los Angeles, appeared by counsel, Martin Roy Robles of the Law Offices of Martin Roy Robles & Associates.

After having considered all pertinent documents, the Court's file and the contents of Plaintiffs' Complaint, as well as all reasonable inferences from the charging allegations of Plaintiffs'

Complaint, the Court finds that Plaintiff, Alderic Jensen, Sr. and Plaintiff, Doris Jensen have failed to plead and are unable to plead as against defendant, County of Los Angeles a viable cause of action based upon the Claim for Damages filed on their behalf with Defendant, County of Los Angeles. Accordingly, the Court hereby grants Defendant's Motion for Judgement on the Pleadings without leave to amend.

DATED: MAY 05 1994, 19___.

JOSEPH R. KALIN, JUDGE
JUDGE

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE. JUN 06 1994

ATTEST

EDWARD M. KRITZMAN

Executive Officer/Clerk of the Superior Court of California, County of Los Angeles.

By Deputy

J. KNIGHT

ROBLES & VERDUGO

A-16

PROOF OF PERSONAL SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is 2120 Huntington Drive, South Pasadena, California 91030.

On April 27, 1994, I personally served a copy of Defendant's ORDER [PROPOSED] on interested parties in this action.

William P. Imperial
Attorney at Law
205 South Broadway
Suite 907
Los Angeles, California 90012

Executed on April 27, 1994, at South Pasadena, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

JASON S. WILSON

PERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/04/94			DEPT. 55
HONORABLE JOSEPH R KALIN	JUDGE	E T ESPINOZA	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM	S AHERN,	ELECTRONIC RECORDING MONITOR
S RAMEY CSL	Deputy Sheriff	A ALBA CT ASST	Reporter

8:15 am BC019538

ALDERIC JENSEN SR. ET AL — Plaintiff Counsel: WILLIAM IMPERIAL (X)

VS

COUNTY OF LOS ANGELES ET AL — Defendant Counsel: MARTIN ROBLES (X)

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT COUNTY OF LOS ANGELES FOR JUDGMENT ON THE PLEADINGS AGAINST PLAINTIFFS, DORIS JENSEN AND ALDERIC JENSON SR.,;

The Motion is argued and granted. Moving party to prepare Judgment and submit it to the Court within 10 days.

Plaintiff's request to amend is denied.

Final status conference of March 7, 1994, and trial date of March 14, 1994, both in this department are advanced to this date and vacated.

Any pending motions are vacated.

Case is ordered removed from department 55's civil active list.

MINUTES ENTERED
03/04/94
COUNTY CLERK

LAW OFFICES
WILLIAM P. IMPERIAL
LOS ANGELES LAW CENTER
205 SOUTH BROADWAY
SUITE 508
LOS ANGELES, CA 90012
TELEPHONE (213) 626-7262

FILED

Attorney for Plaintiffs
ALDERIC JENSEN, SR., DORIS JENSEN,
ALLEN JENSEN, DOUGLAS W. JENSEN,
ROBERT JENSEN, LINDA BESSETTE,
CHERYL MADDALIENA, and JEFFREY JENSEN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALDERIC JENSEN, SR., DORIS JENSEN, ALLEN JENSEN, DOUGLAS W. JENSEN, ROBERT JENSEN, LINDA BESSETTE, CHERYL MADDALIENA, JEFFREY JENSEN, Plaintiffs, vs. COUNTY OF LOS ANGELES, DOES 1 through 50, inclusive, Defendants.	CASE NO: BC019538 COMPLAINT FOR DAMAGES (Tortious Interference with Decedent's Remains) [CC Sec. 3333]

Plaintiffs, ALDERIC JENSEN, SR., DORIS JENSEN, ALLEN JENSEN, DOUGLAS W. JENSEN, ROBERT JENSEN, LINDA BESSETTE, CHERYL MADDALIENA, and JEFFREY JENSEN allege:

1. Plaintiffs, ALDERIC JENSEN, SR., and DORIS JENSEN are the parents of ALDERIC RAYMOND JENSEN JR. hereinafter referred to as "decedent"; Plaintiffs, ALLEN JENSEN, DOUGLAS W. JENSEN, ROBERT JENSEN, LINDA BESSETTE, CHERYL MADDALIENA, and JEFFREY JENSEN are the siblings of decedent.

2. The true names and capacities, whether individual, corporate, associate or otherwise of Defendants DOES 1 through 50, inclusive, are unknown to the Plaintiffs, who therefore sue

JENSEN ALDERIC ET AL V COUNTY OF LOS ANGELES ET AL BC019538 07/28/89

said Defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the Defendants designated as DOE is legally responsible in some manner for the events and happenings herein referred to and negligently caused the injuries and damages alleged herein.

3. Plaintiffs are informed and believe and thereon allege that Defendant COUNTY OF LOS ANGELES is at all times herein mentioned, a municipal corporation, duly organized and chartered under the laws of the State of California, responsible for the hiring, training, and supervising the conduct, practices and policies of the employees and agents of the Defendant COUNTY OF LOS ANGELES, and all its individual members.

4. At all times herein mentioned, each said defendant was acting as the employer, agent, and representative of every other defendant, and each acted within the course and scope of his employment.

5. This action is subject to the provisions of the California Government Tort Liability Act, Government Code section 910, et seq., and Plaintiffs have filed a timely claim in accordance with procedures of same. Said claim was filed by Plaintiffs with Defendant COUNTY OF LOS ANGELES on or about June 22, 1990.

6. ALDERIC RAYMOND JENSEN JR., died on or about January 22, 1990, in Los Angeles, County of Los Angeles, State of California.

7. By reason of the relationship of Plaintiffs and decedent, Plaintiffs were at all times herein mentioned entitled

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to immediate custody and possession of the decedent's remains.

8. On or about March 16, 1990, Defendant willfully interfered with the right of Plaintiffs to dispose of and inter the remains of the decedent by failing to notify Plaintiffs of decedent's death, failing to ascertain Plaintiffs' wishes as to the disposal and burial of decedent's remains, and the cremation of decedent's remains, which were all done contrary to the wishes and beliefs of Plaintiffs.

9. Such interference was willful in that decedent had adequate documentary identification on his person and other unique physical features so that defendant was able to appraise Plaintiffs of decent's demise and ascertain their wishes as to the disposal and burial of Decedent's remains.

10. Defendant's disposal of the decedent's body is and was repugnant, offensive, and insulting to Plaintiffs and their beliefs and learning of defendant's disposition of decedent's body; and thereafter, caused the Plaintiffs extreme mental anguish and disgust and disturbed their peace of mind, causing them to become permanently sick in mind and body.

11. By reason of defendant's acts, Plaintiffs have been damaged in the sum not presently determined.

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WHEREFORE, Plaintiffs pray for judgment as follows:

1. For compensatory damages in an amount according to proof.

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem just and proper.

Dated: January 21, 1991

Respectfully Submitted,
LAW OFFICES OF WILLIAM P. IMPERIAL

Imperial

WILLIAM P. IMPERIAL, Attorneys for Plaintiffs, ALDERIC JENSEN, SR., DORIS JENSEN, ALLEN JENSEN, DOUGLAS W. JENSEN, ROBERT JENSEN, LINDA BESSETTE, CHERYL MADDALIENA, and JEFFREY JENSEN

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A-22

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NUMBER

CERTIFICATE OF ASSIGNMENT

All civil actions or proceedings presented for filing must be accompanied by this certificate.

☒ The undersigned declares that the above entitled matter is filed for proceedings in the Central District of the Los Angeles Superior Court under Section 392 et seq., Code of Civil Procedure and Rule 300 Sections 3 and 4 of this court for the reasons checked below.

The address of the accident, performance, party, detention, place of business, or other factor which qualifies this case for filing in the above designated district is:

Tortious interference with Decedent's remains	1200 No. State Street	
(NAME – INDICATE TITLE OR OTHER QUALIFYING FACTOR)		(ADDRESS)
Los Angeles	California	90033
(CITY)	(STATE)	(ZIP CODE)

		NATURE OF ACTION	GROUND
☐	1	Abandonment	Petitioner resides within the district
☐	2	Adoption	Petitioner resides within the district
☐	3	Adoption	Consent to out-of-state adoption, consentor resides within the district
☐	4	Appeal from Labor Commission Decision	Labor hearing was held within the district
☐	5	Conservator	Petitioner or conservatee resides within the district
☐	6	Contract	Performance in the district is expressly provided for
☐	7	Equity	The cause of action arose within the district
☐	8	Eminent Domain	The property is located within the district
☐	9	Family Law	One or more of the party litigants resides within the district
☐	10	Forcible Entry	The property is located within the district
☐	11	Guardianship	Petitioner or ward resides within the district
☐	12	Habeas Corpus	No action pending, the person is held within the district
☐	13	Mandate*	The defendant functions wholly within the district
☐	14	Name Change	The petitioner resides within the district
☐	15	Personal Property	The property is located within the district
☐	16	Probate	Decedent resided or petitioner resides within the district
☐	17	Prohibition*	The defendant functions wholly within the district
☐	18	Review*	The defendant functions wholly within the district
☐	19	Small Claims Appeal	The lower court is located within the district
☐	20	Title to Real Property	The property is located within the district
☒	21	Tort	The cause of action arose within the district ..
☐	22	Tort	One or more defendant(s) reside within the district
☐	23	Transferred Action	The lower court is located within the district
☐	24	Unlawful Detainer	The property is located within the district

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and this declaration was executed on 1/21/91 at Los Angeles, California.

THE COURT MAY IMPOSE SANCTIONS OR OTHER PENALTIES FOR FAILURE TO FILE IN THE PROPER DISTRICT

(SIGNATURE OF ATTORNEY)

*Prerogative writs concerning a court of inferior jurisdiction shall be filed in Central District.

RULE 300 LASCR

CERTIFICATE OF ASSIGNMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55 HON. JOSEPH R. KALIN, JUDGE

ALDERIC JENSEN, SR., etc., et al. Plaintiffs, vs. COUNTY OF LOS ANGELES, et al. Defendants.	No. BC 019538

TRANSCRIPT OF PROCEEDINGS

March 4, 1994

APPEARANCES:

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Transcribed by: ELEANOR R. HALL TRANSCRIBING
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ORIGINAL

LOS ANGELES, CALIFORNIA, FRIDAY, MARCH 4, 1994
DEPARTMENT NO. 55 HON. JOSEPH R. KALIN, JUDGE
APPEARANCES: (See title page)
(Electronic Recording)

THE COURT: Jensen vs. the County of Los Angeles. Motion for judgment on the pleadings.

MR. ROBLES: Your Honor, may I make a preliminary inquiry of the court?

THE COURT: Yes.

MR. ROBLES: As you will recall the last time we were here, Wednesday, you suggested a concern as to the brevity of the submitted memorandum of points and authorities both by moving and responding party.

THE COURT: Yes.

MR. ROBLES: Heeding the court's words yesterday, the moving party in connection with the motion for judgment on the pleadings filed and served upon opposing counsel a supplemental declaration of points and authorities. I'd like to inquire, has the court received such, as it was filed directly in the department here?

THE COURT: Okay. Let me tell you what I have before me and what I have read. You gentlemen provide me with so many documents that we don't get the file set up. Let me just make sure that...

Okay, let's see what I have. I have the initial Motion for Judgment on the Pleadings filed by the defendants on February the 17th; February the 22nd,

Objection to Defendant's Motion for Judgment on the Pleadings; February 25th, Plaintiff's Opposition to Defendant's Motion for Judgment on the Pleadings.

Then I have on March 3rd I have -- well, wait a second. I don't want to go that far yet. Let's see, that's a different matter here. Different matters.

Then I received on March the 3rd, I have an amended declaration of William Imperial, proof of service William Imperial. I have -- okay. I have Defendant's Supplemental Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings that were filed on the 3rd. I read this document yesterday, and my question is, is there something beyond that?

MR. ROBLES: No, that is the extent.

THE COURT: Okay.

MR. ROBLES: May I just also inquire of the court, you mentioned that you received the opposition by the responding party to the motion for judgment on the pleadings. I believe you indicated a date of February 25 or did I incorrectly hear the court's comments?

THE COURT: Let me see that. Let me go back. Plaintiff's Opposition to Defendant's Motion for Judgment on the Pleadings, Memorandum of Points and Authorities, Request for Sanctions filed -- court stamped February the 25th, 1994.

MR. ROBLES: Very well.

THE COURT: Now I don't have anything beyond that. Have you filed anything, counsel?

MR. ROBLES: Oh, yeah.

THE COURT: Okay. Have you had an opportunity, Mr. Imperial, to go through?

MR. IMPERIAL: Yes, I have.

THE COURT: Okay.

MR. IMPERIAL: I've read it.

MR. ROBLES: Your Honor, may I then, in light of what the court has now indicated, make the following suggestion since we have two motions before the court. One will very easily subsume and be dispositive of one of the other. That is, if we can start with the motion for judgment on the pleadings.

As the court has previously noted to the brevity of the P's and A's, with reference to Health and Safety Code Section 7104, I think it's of help to the court if the court considers the following analysis or breakdown of that code section, because it will help the court as to where we're headed argument-wise at least on the part of the moving party. And in particular, I'll be directing the court's attention to subsection A, which is the pertinent section at bar for this motion for judgment on the pleadings.

If you'll look at that subsection, you have basically a four-component code section. The first, which I'll call section A and this second section section B.

Section A gives a disjunctive set of options; one, that the decedent has not left a proviso as for his interment; or that there be insufficient funds in his

estate for interment. That I must emphasize is in the disjunctive. You choose one of those two from a category of cluster one.

Cluster two is consistent of the following two options: That the duty of interment does not devolve onto anyone in California at the time of the death. I repeat, the duty of interment does not devolve upon anyone in California; or, the second option to cluster two, if such person cannot after reasonable diligence be found within the state of California.

The reason why those four components in that cluster set is important is for the following reason:

When we were here Wednesday last, there was much said as to, quote, the reasonable diligence of inquiry by the coroner's office to locate the decedent's next of kin. With all due respect I submit that is not the standard, that is not the test exclusively, for as the code of Health and Safety Section 7104 says you have those option plays.

Allow me to invite to the court the following:

Before the court now there is no competent evidence that the decedent had left any provision for his interment. I repeat, no evidence that there was a proviso by the decedent for his interment.

Similarly, there is no evidence that the estate, if any, of the decedent was insufficient for purposes of his interment.

However, there is before the court unrebuttable evidence by matters that we have asked the court to take judicial notice of, i.e. court's records, i.e. discovery responses by Mrs. Doris Jensen and Mr. Alderic Jensen, Sr., the father and the mother of the decedent, that are at all times pertinent to the discussion at hand, they were residents of the state of Florida. That is unrebutted, that is conclusive by their own party admissions via the discovery responses. As are the prior admissions of the other next of kin, the brother and sisters who, by their discovery responses, i.e. their party admissions, reside in the state of Rhode Island at all times pertinent hereto.

But inasmuch as the siblings, the brothers and sisters are no longer party litigants to this action, that's irrelevant. Thus the key focus will be upon the mother and father's residency at all times pertinent hereto, i.e. the state of Florida.

Inasmuch as this motion for judgment on the pleadings addresses the four corners of the pleading apparently governing this action, I invite the court's attention to that pleading, and again, you'll see no indication nor any other evidence that has been provided subsequent thereto for the purpose of this hearing there was any provision made by the decedent for his interment. Thus one can offertory conclude that there was no provision for his interment, thereby satisfying element number one of cluster number one of Health and Safety Code Section 7104.

Then we move into the cluster two, does anyone exist in California upon whom the right of interment corresponds? The answer is no, by the very facts that I've brought to the court's attention already.

In this regard the court must be mindful of the fact and the provisions of Health and Safety Code Section 7100 which delineates the tree, if you will, of right for disposition of a decedent. You commence with a decedent's spouse; if no spouse, then to the decedent's children; if no decedent children, then to the mother and father of the decedent and onward.

The intestate succession, chain of command as we learned in law school, the only individuals that survived the decedent in proper order are the mother and father, i.e. residents of the state of Florida. Hence irrebuttably, item number one of cluster number two has been established. There was no one in the state of California upon whom the right of interment of the decedent would fall upon.

By those two elements alone, we submit that under Health and Safety Code Section 7104 the County of Los Angeles, via its coroner's department, had the absolute right to inter the decedent as it did ultimately.

The issue as to whether or not there was reasonable diligence undertaken as was raised Wednesday past is but a red herring issue because it is unrebuttable. There was no one in the state of California surviving the decedent.

As the court well pointed out on Wednesday, you take the language of Health and Safety Code Section 7104 and let's assume that the coroner's office had conducted a search, reasonable or otherwise, and had scoured the 49 -- the 50 states of the country and had not come up, would it matter, given the phrasing of Health and Safety Code Section 7104? I say it would not, as the court itself has leaned and countered upon previously.

So to now devolve into an issue of factual dispute as we heard by Mr. Imperial on Wednesday past as to whether the coroner's office secured telephone records, inquired of the V.A. records, inquired of other sources of potential identification are irrelevant under the analysis and under the statutory language as presented to the court. I submit but a red herring issue, and an issue that the court should not be drawn into.

I will stop at this point, your Honor, because I believe the elements are direct, the law is clear and the conclusion is readily apparent.

I reserve subject to what I hear from Mr. Imperial.

THE COURT: Okay, counsel.

MR. IMPERIAL: Thank you, your Honor.

Perhaps for the record it's important and imperative that I restate exactly what I told you on Wednesday when the court originally indicated that it had some concerns with regard to the applicability of Health and Safety Code Section 7104(a) and the language as stated

therein.

We have to concede, your Honor, with regard to Mr. Robles's argument that we have no evidence as he puts it with regard to the clusters of sections -- or as sectionalized by the code that the decedent made any provision for his demise or his interment -- of course, his interment -- and also that there was anyone who resided in the state upon which he had given that duty. I think that it comes down to, and as the court initially indicated, that one section of 7104 that basically states, "or if such person cannot, after reasonable diligence, be found within the state."

Your Honor, I submit to the court that had the Legislature said that reasonable diligence not be part of the statute, they would have ignored it, it wouldn't have been there. It would have simply read, "or if such person cannot thereafter be found within the state." It doesn't -- reasonable diligence is the statutory language that imposes on any person who has custody of the remains. In this case the coroner took custody of the body, did an autopsy because of the circumstances of the decedent's demise, so the person that had custody of the body, that had a duty to exercise reasonable diligence in locating someone within the state, was the coroner's office. That's undisputed, and it would not be there in this statute if in fact that was not the standard that we're asking the county coroner to be held to in this case.

In that regard, your Honor, if we look at

what the coroner did within the state to locate someone, they did only one thing, and they didn't even do that right. I submit to the court that the one letter that they sent to the V.A. hospital, because he was a veteran, he had his veteran's card on him, he had other I.D. that I'm going to address shortly, but his veteran's I.D. was used to mail one letter to the V.A. hospital and they didn't even do that right, they didn't include the social security numbers correctly. They added two social security numbers when they only needed one.

And in that regard the Veterans Administration sent one letter back saying, "Let us know who the next of kin is or other I.D." Nothing was done after that.

Now in regard to the other identification that was found on Mr. Alderic Jensen, Jr., he had a California I.D. No effort was made to contact the DMV with regard to who Mr. Alderic Jensen, Jr. had the next of kin listed as in his request for his -- or in his application for his California I.D. None of that was done.

With regard to Mr. -- the decedent's social security number, he had that. No effort was made within the state of California, no reasonable diligence.

Why would the language be in the statute if the Legislature hadn't said when they amended the statute in 1988 that this, in fact, is the standard that the coroner must follow?

Mr. Alderic Jensen also had a Rhode Island

I.D. on him bearing his parents' Rhode Island address. They were residents of Rhode Island. They still owned the Rhode Island home address that Mr. Alderic Jensen, Jr. had in his possession when he died. He still had his Rhode Island driver's license on him, and on that driver's license it had the Rhode Island address of his parents' home in Rhode Island.

In fact at that point in time when he died his brother, the brother of the decedent, lived in the family home in Rhode Island. No telephone records were attempted to be utilized by the county coroner's office, nothing was done except for that one letter. What reasonable diligence was exercised?

The defendants do not address that issue. Instead what they want to do is they want to say, "Well, we want to focus on be found within the state." Your Honor, why would reasonable diligence be there? Why didn't the Legislature just say, "or such person cannot after diligence be found within the state"?

Let me tell you why, your Honor, I'm addressing that issue of reasonable diligence. I don't believe that we can rely on it because the decedent and the cause -- the decedent died in 1990. A cause of action or a lawsuit was filed in 1991 but the Legislature in 1992 enacted 7104.1, and that reads:

> "If within 30 days after the coroner notifies or diligently attempts to notify the person responsible for the interment or

interment of a decedent's remains which are in the possession of the coroner, the person fails, refuses or neglects to inter the remains, the coroner may inter the remains. The coroner may recover any expenses of the interment from the responsible person."

This is 7104.1.

Now, in that regard, your Honor, why would the language of this statute which follows 7104 also indicate diligence, and yet above that indicate reasonable diligence?

The statute, I believe, is clear and it does turn on the interpretation of the courts with regard to how that section or subsection of 7104 is read, and that's what I addressed the court on Wednesday.

THE COURT: Well, 7104.1, counsel, appears to be a product of the Legislature's desire to collect money to offset state charges. What you have there is is that if the person the coroner notifies or diligently attempts to notify the person responsible for the interment and that person fails, refuses or neglects to inter the remains, then the coroner doesn't have to hold the body forever in a cold storage locker, they have a right to inter the remains and then recover any expenses of the interment from the responsible person. It is a method of the State in our times, you know, of shortages of tax dollars and increasing demands on the tax dollars to try to obtain some of this money back. It's a collection statute.

MR. IMPERIAL: Your Honor, the only reason I was raising the statute, and I believe I had prefaced my statement with regard to reading the statute is that the language of diligence is also mentioned in there, the word diligence.

THE COURT: Well, what they're saying in here is --

MR. IMPERIAL: Well, I understand it's for recovery of costs.

THE COURT: If they diligently attempt to notify the person responsible, then they can proceed. If they later -- if they later locate that person, they can then file a lawsuit against them even though they didn't give them actual notification.

MR. IMPERIAL: And I agree with the court, but we're still dealing with whether the county coroner did anything to notify the next of kin, what reasonable diligence was exercised here?

THE COURT: Well, here's the question I have: The statute appears to be pretty clear in the sense that their duty to notify ends at the state lines.

Is there a common law duty -- well, first of all, I don't believe there is a common law duty to notify anybody that I'm aware of, nor has anybody given any statutes to me or any case law, so the County -- what the County does is it establishes -- or the State establishes the law, the Legislature, imposing a duty on the County to diligently look for the next of kin, the person who has the right to inter, and then they limit it to the state borders.

Now, I'm assuming that prior to that State Legislature imposing a duty on the County to do this that no duty -- there was no common law duty that required the County to do anything, so the State, then, says, "Okay, we're imposing this duty and we're putting limitations on that duty." Is there any common law -- because certainly there is no statute -- is there any common law that says that the County has a duty to search outside of the state? I can't find any, so they are obligated to search according to the statute within the state, but they have no duty to search outside of the state.

What common law duty, or statutory duty, which I can't find any, requires them even to notify a relative outside the state who has a right to inter, even if they know where that relative is at?

MR. ROBLES: Your Honor, if I might be heard, I might be able to shed some light on the very question.

In the supplemental declaration of points and authorities submitted in support of the motion for judgment on the pleadings, there is a case by the name Enos, E-n-o-s, vs. Snyder that was cited to the court. It's a vintage case, cited in 1900, but on page 72 of that decision, the very point that the court has just raised was addressed.

Although factually that case can be distinguished, the principle of law that we are addressing now, vis-a-vis Health and Safety Code 7104 is addressed; one, the issue who has the right of interment which we now address contemporaneously by Health and Safety Code Section

7100, but then the second part, the geographical limitations that we are addressing via Health and Safety Code 7104(a).

If the court cares, I'd be more than glad to favor the court with my copy of the case report so it can see what I'm alluding to. Would the court care to?

THE COURT: Well, if you have a copy of it there because I have it up on the third shelf. It's been put back already. Or the fourth shelf, I'm not sure which.

MR. ROBLES: One of the higher shelves.

THE COURT: One of the higher shelves, yes. I have to hang from the ceiling when I pull it out, that's the problem.

MR. ROBLES: I know the feeling well, your Honor.

(Pause on record)

THE COURT: You know, it seems, counsel, that what the issue before the court is is that the County imposes upon itself -- or the State imposes upon the County the responsibility to reasonably look within the state for a person who has the right of interment, but then it imposes the duty and the obligation on the County to actually do the interment. The County can't just take the body and leave it on the beach.

MR. ROBLES: That's correct.

THE COURT: So do they not have the paramount -- if there is no other relative in the state who has the right to interment, that obligation and duty rests upon the County, and if the County doesn't do that, then the County

can be responsible for not complying with the State statute, so do they not have the primary duty for the interment unless the other person who had that right lived within the state?

MR. ROBLES: That is the position of the moving party, your Honor, and that was very well focused. I thank you.

THE COURT: Mr. Imperial?

MR. IMPERIAL: Judge, I believe if you look at the undisputed facts of the case, I haven't heard any other argument made with regard to the actual facts of this particular case.

I think the court has put it well, but in terms of its applicability in this particular instance, what did the County do to look within the state? They did one thing, they sent one letter to the V.A. Hospital. To say that that was sufficient on a factual basis, that that was in fact reasonable diligence in this case, is that the County exercised reasonable diligence to find the next of kin within this state, and they did absolutely nothing, I think is actually making this not so much a motion for judgment on the pleadings but a motion for summary judgment. Either way the effect would be the same.

My position is this, your Honor, if I may, just to make sure that we're clear for the record, and I had raised this initially. My client was a veteran. What rights do veterans have within the United States? This particular statute passed by our Legislature in 1988 says

reasonable diligence to find. They exercised no reasonable diligence. There's no basis at all for the defendants to say, "Well, we don't have to do anything to look within the state." Here it is, reasonable diligence be found within the state. It's in the statute.

Also, your Honor, if the search is to be limited to the boundaries of the state, then you're assuming that a search has occurred.

If you look at the Enos case vs. Snyder, the case itself is factually different. The language applies to a situation -- if I may? Yes, in 1900 there was decided in 1900 when the era or times were a lot different. We have fax machines, we've got video conferencing done, we've got different methods of communication. None of that was done.

I forgot to mention for the record, your Honor, that during the discovery it came out that Mr. -- the decedent, Mr. Alderic Jensen, Jr., had been convicted of a felony. No CIIC check was done, no criminal check within the state was done of Mr. Alderic Jensen. That would have produced his home address in Rhode Island.

Now, if the court is saying, geez, if we look at reasonable diligence and we say we're going to look within the state only, well, then that would then shift to the County to say, "Well, they live in -- the next of kin lives in Hawaii, we verified that, there's nothing for us to do. We don't have to send one letter, we don't have to make one phone call." I think that that would violate, and

I raised this earlier, that that would violate the Equal Protection Clause of both the California Constitution and the U.S. Constitution. The rights of citizens in general are generalized statutes.

The State may give the right to sue to the Jensens under 7104 but once it gives that right, I don't think it can necessarily limit it on a factual basis. They had rights as citizens to be notified of the demise of their son and also advised as to what ought to be done with regard to that body. None of that was done. No contact was made with the Jensens at all.

Now, there is no doubt in this case that the County autopsied Mr. -- the decedent, Alderic Jensen, Jr., and thereafter did not notify the family.

And I know that the court has mentioned that, well, the County is strapped, they don't have any money. The State hasn't any money, it's hard economic times. This is a statutorily imposed duty of exercising reasonable diligence.

THE COURT: Well, money has nothing to do with it. If they have a statutory duty to produce something, they can't say, "We don't have the money."

MR. IMPERIAL: Right.

THE COURT: And if the County were to lose this case and you had a judgment for X amount of dollars, they would have to pay it, you know.

MR. IMPERIAL: Well, the only reason I mention that, your Honor, is when we talk about exercising what

reasonable diligence is, you know, that is a factual dispute. Otherwise the County can just sit back and say, "Well, we found out that the next of kin is in Nevada or in Arizona, in Needles." Actually Needles is Cali -- Laughlin, for example, "We don't have to contact them." And I don't think that's what the statute says. They have to exercise reasonable diligence. The County had that duty. They had possession of the body.

THE COURT: Well, where does it say they have to exercise reasonable diligence to locate somebody outside the state of California?

MR. IMPERIAL: But reasonable diligence within the state. They did nothing within the state.

THE COURT: But there was nobody within the state.

MR. IMPERIAL: Well, that would not make a difference under the statute.

THE COURT: Well, counsel, let me say this: Going to the statute, 7104, apparently there is no evidence before the court that the defendant left any provision for his interment.

MR. IMPERIAL: We would stipulate to that, your Honor.

THE COURT: Okay. There's no evidence that the estate was insufficient to provide for the interment.

MR. ROBLES: To the contrary, no evidence that it was sufficient to provide.

THE COURT: I mean sufficient to do it. I mean --

MR. IMPERIAL: Your Honor --

THE COURT: -- right, right.

MR. IMPERIAL: -- may I speak to that?

THE COURT: Yes.

MR. IMPERIAL: The reason that there isn't any evidence is because we still haven't been provided with form number 2 that the court ordered Mr. Robles to provide to us that was basically an inventory of the decedent's property --

THE COURT: Well --

MR. IMPERIAL: -- so I can't stipulate to that.

THE COURT: Well, I'm not asking you to stipulate to it, because if there was money sufficient for his interment, still the County has the responsibility and the obligation to inter him, so whether they spent his money or they spent the County's money, they still would do the interment and the 7104.1 provides a basis for the County to then attempt to recover that money if the County spent the money, so as far as whether there was sufficient money or insufficient money, the County acted and spent the County's money to do the interment.

If the County doesn't want to go looking for somebody and chooses not to attempt to find someone to pay these costs, then they have assumed the responsibility and the obligation under the code, which they're required to do, is to bury this particular person.

I think the facts are clear and evident that the father and mother resided in Florida and under 7100 of the Government Code, they are the persons who had the right

to the decedent's remains for purposes of interment, and at all the relevant times herein, they did reside in the state of Florida.

The court has previously, by motion for summary judgment or adjudication, has ruled that the brothers and sisters had no right to bring this lawsuit. If the court was right on that ruling, of course, then they should not be considered, but even if the court was wrong on that ruling, they reside in the state of Rhode Island and were not within the state of California or to be located within the state of California, and, of course, the family tree, you know, it ends at that point in time.

I think what this comes down to is is that -- under the common law, if someone were to die before there were any statute, there was no statutory provision to provide for the interment or the responsibility, and so the Legislature entered into this area for the purpose of the disposition of remains, and I mean, it's obviously, for health purposes, when someone deceases, they have to do something with the remains. You know, I assume one could spread disease that way by leaving the body out in the woods somewhere. So when the State entered into this, they imposed a duty and an obligation on the County and that duty and obligation is spelled out quite clearly that they make a reasonable diligence someone be found within the state.

I have no common law or any cases cited to me that extends that to look outside of the state. In fact, I

have no case law that says if they were to find an address in the state of California of somebody in Florida that they would have an obligation to notify that person in Florida.

Because there is no one in the state of California and was no one in the state of California at the time of the death and when the decedent's remains were disposed of, there is an obligation placed upon the County to dispose of the remains, and they have at that point not only the responsibility and the duty, but if there's such a thing as a right, a right to make the determination through that duty as to the interment, how it took place, when and all of the elements that go with that, and it seems to me under the statute that as long as there is no one else in the state that that is solely the decision and the responsibility of the County, and that the only way that they would -- they would have to relinquish that responsibility to someone outside of the state, but it seems to me under -- if somebody outside of the state of California wanted to deal with the remains within the state of California, they would have to have the permission of the County to do it under this statute. It would seem as a practical matter the County would probably grant that, but I think that under the statute they wouldn't have to. They could say, "We're going to inter the body and it was nice of you to volunteer to do it, but we're going to do what we have a duty and responsibility to do under 7104."

So I think the defendant had the absolute right to inter the deceased by the mere fact that the

deceased died in California, the body was in California and there was nobody in the state of California to -- under the statute to take charge of the remains.

Additionally, the plaintiff raises the issue that there was not a reasonable diligence by the County here to locate somebody within the state of California. We know there was nobody in the state of California, so even if they had exercised more diligence, we still have the fact that how do you translate someone's not doing something that we now find would have been a futile act? You would have to say the state of California has liability because they didn't use reasonable diligence when we know that the use of that reasonable diligence would not have produced anything, so I think that would cut off any damages that we would have under the situation, because damages have to be real, and based upon something by the County in terms of causing harm to other parties and the statute cuts off that harm by saying it stops at the state lines, and I believe that the obligation of reasonable diligence goes only within the state lines, and even if, as I said before, they found an address for somebody in another state, I don't believe the statute puts a duty on them to go outside of the state and look for somebody even if they have reason to suspect or know that somebody who has the right to inter, such as the parents here, could be located.

And again, I think -- I am basing my decision here on the duty of the County to inter the body and the

remains, and I don't know that you would necessarily call that a right, but I think the duty establishes that right as between the County and somebody out of state to make the final disposition as they have here.

All right. I think the law here is -- I don't know if it's right or it's wrong. I mean, if this case goes up on an appeal, it would seem to me that if, you know, if the State knew, for instance, if there was a relative in another state, you know, it might be you send them a telegram or a letter but I don't think you can that impose that duty on them when the statute cuts it off. I think it's for the Legislature to determine the way the County is to operate and that they have so determined, and that if what they have set forth is no longer something that fits today's modern world of faxes and mobile phones and everything else, I don't know that it's up to this court to read that into a statute which appears to be clear on its face.

I just don't find a common law duty here, and as I say, if the appeals court can find one, then I assume that this case will go to trial, but I don't think the plaintiff has established a common law duty and I don't see one, so the court is going to grant the motion for judgment on the pleadings which takes all of the other issues before the court off.

The defendant is ordered to prepare a order granting the -- or a -- yeah, an order granting a judgment on the pleadings and actually prepare the judgment for the

court's signature within 10 days so that the plaintiff has an opportunity to, you know, take the matter up on appeal under the circumstances.

The trial date is vacated and the court is going to take about a five-minute recess so that you gentlemen can leave and the trial can find themselves at the table.

MR. IMPERIAL: Your Honor, with that, then, you're also denying my motion to amend the pleadings as well?

THE COURT: I don't believe the pleadings can be amended, counsel.

MR. IMPERIAL: That's what I'm saying.

THE COURT: Yes, I'll deny that. Whatever you want on the record because --

MR. IMPERIAL: I want to make sure the record is clear. I don't want it to go up and then be told that we didn't complete the proceedings today.

In regard to that, your Honor, I'm objecting to your ruling. Thank you.

THE COURT: I understand, counsel, and maybe you're right. Maybe you've established by common law a duty but I don't see it at this point in time, I don't know that under the circumstances. I have to follow the law and I think I'm following it.

MR. ROBLES: Your Honor, a point of inquiry, if I may just very quickly.

Counsel suggested to a motion for leave to amend. Was there a formal written motion filed with the

court, because I'm not aware of one. If that is to be construed competent-wise that he is making an oral motion at this time.

THE COURT: Well, there was in the paperwork, in the response he was asking for the right to amend --

MR. ROBLES: Very well.

THE COURT: -- and if that is properly before the court, I'm denying it, so I want a record. You don't want to appeal things piecemeal, appeal it all.

MR. ROBLES: No, and just for the record's sake, if the court is correct in its recollection that that request was embodied in the opposition, there is a formal objection as denial of due process relative to timely notice for such a motion since the request was embodied in simply an opposition as opposed to a formal motion as required by CRC 313, et seq., and the local Department Policy Manual Rules requiring motions be noticed, attaching points and authorities and proper declarations for the sought relief.

MR. IMPERIAL: Your Honor, with regard to that, let me just state for the record that Code of Civil Procedure Section 438(h)(2) provides that where a motion is granted pursuant to the section, that's the judgment on the pleadings section, then the court shall grant 30 days to the party against whom the motion was granted to file an amended complaint or answer, as the case may be. I don't have to bring a separate motion. It's provided for in the code.

Thank you, your Honor.

MR. ROBLES: Good day, your Honor.

(The proceedings were concluded)

--ooo--

APPENDIX C

Second Appellate District, Division Three, No. B084952
S054922

IN THE SUPREME COURT OF CALIFORNIA

ALDERIC JENSEN SR. Et Al., Appellants

v.

COUNTY OF LOS ANGELES, Respondent

SUPREME COURT
FILED
AUG 2 1 1996
Robert Wandruff Clerk
Deputy

Petition for review DENIED.

GEORGE
Chief Justice

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SUPERIOR COURT
LOS ANGELES

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ALDERIC JENSEN, SR. and DORIS JENSEN,
Plaintiffs and Appellants, In Pro Per

vs.

COUNTY OF LOS ANGELES,
Defendant and Respondent.

PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California:

ALDERIC JENSEN, SR. and DORIS JENSEN, IN PRO PER, Plaintiffs and Appellants, respectfully petition for review following the decision of the Court of Appeal, Second Appellant District, Division Three (Per Alderich, J.) filed on June 19, 1996. A copy of the Opinion is attached to this Petition asd Exhibit "A".

I.

ISSUE PRESENTED FOR REVIEW

Whether, Defendants' and Respondents' Motion for Judgment on the Pleadings

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b. THERE IS ALSO A COMMON LAW BASIS FOR THE DUTY OWED APPELLANTS BY RESPONDENT NOT TO UNREASONABLY INTERFERE WITH THEIR RIGHTS WITH RESPECT TO THE DECEDENT'S REMAINS

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ALDERIC JENSEN, SR. and DORIS JENSEN,
Plaintiffs and Appellants, In Pro Per

vs.

COUNTY OF LOS ANGELES,
Defendant and Respondent

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 3

ALDERIC JENSEN, SR., IN PRO PER
DORIS JENSEN, IN PRO PER
5922 Arbol Drive
Del Rey Beach, 33484

Plaintiffs and Appellants

BO84952

A-57

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ALDERIC JENSEN, SR. and DORIS JENSEN,
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I.

ISSUE PRESENTED FOR REVIEW

Whether, Defendants' and Respondents' Motion for Judgment on the Pleadings

without leave to amend should have been granted for failure to state a cause of action.

II.

WHY REVIEW SHOULD BE GRANTED

This Petition presents to this Court an issue that addresss significant issues concerning the appellate process. Resolving this issue will secure uniformity of decisions and settle important questions of law.

The Defendant and Respondent rufused to provide Form Number two (2) as ordered by the Superior Court Judge. This form was basically, an inventory of the decedent's property.

This discovery would have proved that the decedent's estate was sifficient to provide for the interment; therefore, nullifying Health and Safety Code Section 7104 (indigent status).

That the Superior Court Judge during the proceedings stated "the county is strapped, they don't have any money ____ . Would this statement lead us to believe there was prejudice based on his decision?

That for the record the decedent, Alderic R. Jensen, Jr. resided in an apartment on Hudson Street. His body was positively identified by the manager which was all stated in the police report. This would also nullify Health and Safety Code 7104.

The decedent was a veteran honorably discharged after completion of service. He was entitled to a military funeral, burial in a Veteran's cemetery, also nullifying Health and Safety Code Section 7104.

The ground for a motion for judgment on the pleadings is that the complaint

fails to state a cause of action. Code of Civil Procedure Section 438(c)(1)(B)(ii). This requirement means "...judgment on the pleadings may be upheld only if the complaint, liberally construed, fails to state a cause of action on any theory." Frank Barney v. Aetna Casualty and Surety Company (1986) 185 Cal.App.3d 966; see also, Covo v. Lobue (1963) 220 Cal.App.2d 218,221 [a judgment on the pleadings cannot be sustained "if the pleading, liberally construed, states a cause of action on any theory."].

II. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

"Review of a judgment on the pleadings requires the appellate court to determine, *de novo* and as a matter of law, whether the complaint states a cause of action. *[citation omitted]* For purposes of this review, we accept as true all material facts alleged in the complaint. *[citation omitted]*" ***Ott v. Alfa-Laval Agri*** (1995) 31 Cal.App.4th 1439, _____, 1995 LawDisc Ca-Cv-Ap 46, par.035; *But see,* Code of Civil Procedure section 438(d).

The following facts are alleged in the complaint:

1. Appellants are the parents of Alderic R. Jensen, Jr. (CT 1, ¶1)
2. This action is subject to the California Government Tort Liability Act and appellants duly filed a claim on June 22, 1990. (CT 2, ¶5)
3. Alderic R. Jensen Jr. died on January 22, 1990. (CT 2, ¶6)
4. Appellants, as the parents of the decedent, were entitled to the immediate custody and possession of the remains of their son. (CT 2, ¶7)
5. Respondent willfully interfered with the right of appellants to ". . . dispose of and inter the remains of the decedent by failing to notify [appellants] of decedent's death, failing to ascertain

[appellants'] wishes as to the disposal and burial of decedent's remains, and the cremation of decedent's remains, which were all done contrary to [their] wishes and beliefs . . . ." (CT 3, ¶8)

6. "Such interference was willful in that decedent had adequate documentary identification on his person and other unique physical features so that defendant was able to appraise [appellants] of decent's demise and ascertain their wishes as to the disposal and burial of Decedent's remains." (CT 3, ¶9)

7. "Defendant's disposal of the decedent's body is and was repugnant, offensive, and insulting to Plaintiffs and their beliefs and learning of defendant's disposition of decedent's body; and thereafter, caused the Plaintiffs extreme mental anguish and disgust and disturbed their peace of mind, causing them to become permanently sick in mind and body." (CT 3, ¶10)

8. As a result of respondent's acts, appellants suffered damages. (CT 3, ¶11)

B. PROCEDURAL HISTORY

On January 8, 1993, this matter was first set for jury trial, on April 19, 1993. (ACT 1)[3] The trial date was subsequently reset, until eventually the matter was set for jury trial on March 14, 1994. (CT 58)

On February 17, 1993, some 304 days after the initial trial setting, respondent filed the Motion for Judgment on the Pleadings which is the subject of this appeal, setting a hearing date on March 4, 1994. (CT 6) The motion was alleged to be made on the ground that "plaintiffs' complaint fails to state facts sufficient to constitute a cause of action pursuant to and is barred by California Health and Safety Code., Section, 7104." (CT 8 - 9)

Appellants filed written opposition to the motion on February 22, 1994 (CT 47 - 51) and February 25, 1994 (ACT 3 - 11). In their opposing papers, appellants requested leave to amend, in the event the motion was granted. (ACT 7)

Respondent's Motion for Judgment on the Pleadings was heard on March 4, 1994. The lower court granted the motion, and denied appellants leave to amend. The court, at the same time, ordered respondent "to prepare Judgment and submit it to the Court within 10 days." (CT 58) Respondent subsequently prepared an "Order," which was on May 5, 1994, signed by the court and entered. (CT 62 - 63)

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[3] "ACT" refers to Augmentation to Court Transcript, per order filed on April 12, 1995.

The Order recited, among other things, the following:

> ". . . the Court finds that Plaintiff, Alderic Jensen, Sr. and Plaintiff, Doris Jensen have failed to plead and are unable to plead as against defendant, County of Los Angeles a viable cause of action based upon the Claim for Damages filed on their behalf with Defendant, County of Los Angeles. Accordingly, the Court hereby grants Defendant's Motion for Judgment on the Pleadings without leave to amend."

At the hearing on the motion for judgment on the pleadings, the court also ordered that all pending motions be vacated and the case removed from the civil active list. (CT 58)

A judgment was never prepared or entered. Only an "Order" was prepared for and signed by the court. The Order was filed on May 5, 1994. (CT 62) The Notice of Appeal was filed on June 7, 1994.[4] (CT 65)

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[4] In *Donohue v. State of California* (1986) 178 Cal.App.3d 795, at 800, Justice Lillie had before her a similar case, where there was only an order granting a motion for judgment on the pleadings and no judgment: " The record contains no judgment; it contains only an order granting the motion. In view of the requirement that a clerk's transcript contain the judgment appealed from, whether or not designated by the parties *[citation omitted]*, it must be presumed that no judgment was prepared, signed and entered. However, plaintiff's attempt to appeal from a nonexistent judgment does not require dismissal of the appeal. The merits of the appeal have been fully briefed by both parties and no prejudice to defendant would result from considering the merits. Under these circumstances, 'to dismiss the appeal merely to have a judgment formally entered below with a new appeal would be a useless waste of judicial and litigant time.' *[citations omitted]* Accordingly, we order the trial court to enter, nunc pro tunc as of the date of the order granting defendant's motion for judgment on the pleadings, a judgment dismissing the action as to defendant *[citation omitted]*, and we then construe the notice of appeal to refer to such judgment. *[cit.omit.]*" It is hoped this Court will be as indulgent.

III. ARGUMENT

The Motion for Judgment on the Pleadings was granted on the ground that the complaint failed to state a cause of action against respondent. (CT 62 - 63) Appellants contend on appeal that the Motion for Judgment on the Pleadings should not have been granted because a cause of action is stated against respondent. Appellants also contend that the trial court erred in considering extrinsic evidence in support of the motion and that the motion was not timely made. Finally, appellants contend that leave to amend should have been granted.

A. THE MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD NOT HAVE BEEN GRANTED

In 1993 the Legislature enacted Code of Civil Procedure section 438 which for the first time provided a statutory basis for the grounds and procedures for a motion for judgment on the pleadings. Prior to the enactment of Code of Civil Procedure section 438, a motion for judgment on the pleadings was generally considered to have the same function as a general demurrer. See, e.g., ***People v. $20,000.00 U.S. Currency*** (1991) 235 Cal.App.3d 682, 691.

Although Code of Civil Procedure section 438 incorporated much of the common law motion for judgment on the pleadings, as will be discussed later, for the first time strict time limits were established for bringing the motion.

The Motion for Judgment on the Pleadings should never have been granted for at least three reasons. First, the complaint states a cause of action for negligent breach of the duty imposed on respondent by both Health and Safety Code section 7200 and the common law. Second, the Motion for Judgment on the Pleadings was improperly based upon extrinsic evidence, rather than properly considering only the allegations in the complaint, effectively making it a Motion for Summary Judgment without regard to any of the due process safeguards embedded in the laws concerning summary judgment motions. Third, the Motion for Judgment on the Pleadings was made so close to trial as to violate the letter as well as the spirit of Code of Civil Procedure section 438(e).

1. THE COMPLAINT, LIBERALLY CONSTRUED, STATES A CAUSE OF ACTION AGAINST RESPONDENT.

The ground for a motion for judgment on the pleadings is that the complaint fails to state a cause of action. Code of Civil Procedure §438(c)(1)(B)(ii). This requirement means ". . . a judgment on the pleadings may be upheld only if the complaint, liberally construed, fails to state a cause of action on any theory." *Frank Barney v. Aetna Casualty and Surety Company* (1986) 185 Cal.App.3d 966; see also, *Covo v. Lobue* (1963) 220 Cal.App.2d 218, 221 [a judgment on the pleadings cannot be sustained "if the pleading, liberally construed, states a cause of action on

any theory."].

a. THE RIGHT OF A DECEDENT'S NEXT OF KIN TO CONTROL THE DISPOSITION OF THE DECEDENT'S REMAINS IS WELL ESTABLISHED AND INTERFERENCE WITH THAT RIGHT IS ACTIONABLE.

Health and Safety Code section 7100 provides in pertinent part:

> The right to control the disposition of the remains of a deceased person . . . vests in, and the duty of interment . . . devolves upon the following in the order named: (a) The surviving spouse. (b) The surviving child or children of the decedent. (c) The surviving parent or parents of the decedent. . . .

In *Christensen v. Superior Court* (1991) 54 Cal.3d 868, the California Supreme Court had to decide "whether persons other than those who contract for the services of mortuaries and crematoria or have the statutory right to direct the disposition of the body of a decedent may recover damages for emotional distress engendered by knowledge of the negligent or intentional mishandling of the decedent's remains when they did not observe the misconduct or its consequences." The Court recognized the right of the next of kin to not have their decedent's remains mishandled:

> . . . . The Court of Appeal held that close family members may recover damages for the emotional distress they suffer if remains are negligently or intentionally mishan-

> dled, and that if the mishandling is intentional all family members and close friends of the deceased may do so.
>
> We agree that the class of persons who may recover for emotional distress negligently caused by the defendants is not limited to those who have the statutory right to control disposition of the remains and those who contract for disposition.

Ibid. at 875 - 876.

In *Sinai Temple v. Kaplan* (1976) 54 Cal.App.3d 1103, 1110, the court had to "ascertain whether in fact a cause of action in tort exists for interference with the disposition of a decedent's body" by burying the decedent according to procedures which contravened the beliefs[5] of the party who had the right to dispose. The court, in finding that such a cause of action exists in California, stated the following:

> The duty to bury a corpse and to preserve its remains is a legal right which courts of law will recognize and protect. [footnote omitted] Such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin. [citations omitted]

Ibid. at 1111.

In *Ross v. Forest Lawn Memorial Park* (1984) 153 Cal.App.3d 988, the court held, among other things, that a complaint stated a cause of action for interference

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[5] The Court set forth those beliefs at its footnote #15: "In her declaration opposing respondent's motion for summary judgment appellant listed reasons why the funeral arrangements were contrary to decedent's and the child's beliefs. She stated the ceremony and cemetery were Jewish, that the decedent was an agnostic, and that the burial of decedent in a Jewish cemetery would refute those philosophic principles by which the decedent guided his life. Moreover, the daughter, Alisa, was raised as an agnostic, and therefore this religious burial would also be contrary to her beliefs."

with the right of a decedent's next of kin to bar certain persons from the funeral services of the decedent. In so holding, the court broadly interpreted the rights and duties of the next of kin under Health and Safety Code section 7100:

> In this state, as well as in other jurisdictions, the right of disposition has been found to include the right to be free from interference with the exercise of that right. *[citation omitted]* In other jurisdictions, the right of disposition has been found to include, as well, "the right to determine the time, manner and place of burial." *[citation omitted]* Seaton v. Commonwealth (1912) 149 Ky. 498, held that a father could not be subjected to punishment for his refusal to permit his relatives and his wife's relatives to be notified so that they might attend the funeral of his infant daughter because "they had no legal right to be present. . . . In some localities funerals are not infrequently attended by invitation, Some are strictly private; while others are open to the public. These are matters which address themselves to the discretion and will of those in interest . . . ." (Id. at 873.) In Haney v. Stamper (1939) 277 Ky. I, where the surviving spouse had the right to dispose, the brother of the deceased was prevented by the widow from attending the funeral services. The court stated the rule that the surviving spouse had "the paramount right not only to the custody of the dead body, but also to determine the time, manner and place of burial." This right "excludes the rights of others even though they be the next of kin. The two rights cannot occupy the same space at the same time; and, unless the right of the . . . [person in control of the remains] is to be deemed wholly illusory, it must be exclusive." *[citation omitted]* We agree.
>
> The right to control the disposition of the remains of the deceased as set forth in section 7100 must include the right to private funeral and burial services. ***The one in whom the right to control vests by statute has the right and the power to dispose of the remains without services,***

> ***with public services or with services attended by invited guests only.*** . . .

Ibid. at 989 [emphasis added].

Finally, in ***Shelton v. City of Westminster*** (1982) 138 Cal.App.3d 610, the court was called upon to interpret a section of the Penal Code relating to the use of dental records in cases of missing persons, since superseded by subsequent enactments. Justice Wiener noted the importance of promptly establishing the identity of a decedent and delivering decedent's remains to next of kin for interment:

> The Legislature would thus appear to have considered other factors in adopting Penal Code section 11114. One result of facilitated identification which comes quickly to mind is that the previously unidentified bodies may be removed from county medical facilities and returned to the victim's family for proper disposition. *The Legislature doubtless was aware that for cultural and religious reasons, the internment or other disposition of the deceased's body is an extremely important emotional catharsis for the family and friends of the deceased. Moreover, the uncertainty which attends a presumed but unconfirmed death is nearly always an emotionally wrenching experience for loved ones. [footnote omitted]* One need only look to the years of continuing national concern over servicemen missing in action in the Vietnam War as demonstrating that such perceptions are almost a definitional attribute of American if not human culture.

Ibid. at 625 [emphasis added]

b. THERE IS ALSO A COMMON LAW BASIS FOR THE DUTY OWED APPELLANTS BY RESPONDENT NOT TO UNREASONABLY INTERFERE WITH THEIR RIGHTS WITH RESPECT TO THE DECEDENT'S REMAINS.

A case history of the common law right of a decedent's next of kin to the decedent's remains can be found in the case of *Spiegel v. Evergreen Cemetery Co.* (1936) 117 N.J.L. 90, where the court stated in part:

> . . . It was indubitably the plaintiffs' right, at the common law as well as in virtue of the obligation thus undertaken by the defendant company, to witness the interment. This is of the very essence and substance of a common-law right growing out of the domestic relation. The family tie binds us to the place of final repose of all that is earthly of our departed kin: and, therefore, it was plaintiffs' civil right, one bestowed and shielded by the law, to have knowledge altogether certain and specific, of the location of the last resting place, as well as the solace of the final leave taking. The early English common law sheds little light on the subject. During its formative period. the ecclesiastical courts had jurisdiction of the dead: and, in consonance with the doctrines of that jurisdiction, the common law early rejected the concept of property in the corpse and the ashes. and treated them as subjects largely of church superintendency. But the assumption of exclusive jurisdiction by the temporal courts brought radical changes of theory, and it is now the prevailing rule, in England as well as in this country, that the right to bury the dead and preserve the remains is a quasi right in property, the infringement of which may be redressed by an action in damages. The dead body is no longer res nullius. [Citations.]"

The statutory duty to bury the dead, and right to control the disposition of

remains, evolved from a common law obligation imposed to ensure the right of every person to "a decent Christian burial." (Comment, PROPERTY -- NATURE OF RIGHTS IN DEAD BODIES – RIGHT OF BURIAL (1939) 12 So.Cal.L.Rev. 435, 438.)

c. HEALTH AND SAFETY CODE SECTION 7200 SETS FORTH A SEPARATE DUTY OWED BY RESPONDENT TO APPELLANTS TO USE DUE DILIGENCE TO NOTIFY RELATIVES OF THE DECEDENT OF THE FACT OF DEATH.

Government Code section 815.6 provides:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Health and Safety Code section 7200 provides in pertinent part:

> Every head of a public institution, city or county undertaker, or State, county or city officer having charge or control of remains to be interred at public expense, *shall use due diligence to notify the relatives of the decedent*.

The failure by a government entity to use due diligence to notify relatives of the decedent was considered in the New York appellate case of *Finn v. New York*

(1973)70 Misc 2d 947, 335 NYS2d 516, revd on other grounds, 76 Misc 2d 388, 350 NYS2d 552. In that case, it was held decedent's widow was entitled to damages against the City of New York for the negligent failure of the city to notify her of her husband's death. The decedent's body lay unclaimed in the city morgue for some eight days after the widow reported the disappearance to city police who conducted the search for her husband.

d. NEITHER RESPONDENT'S INTERFERENCE WITH APPELLANTS' RIGHTS NOR RESPONDENT'S BREACH OF ITS DUTY TO NOTIFY APPELLANTS, AS ALLEGED IN THE COMPLAINT, ARE EXCUSED BY HEALTH AND SAFETY CODE SECTION 7104.

Health and Safety Code section 7104 provides:

> When no provision is made by decedent, or where the estate is insufficient to provide for interment and the duty of interment does not devolve upon any other person residing in the state *or if such person can not after reasonable diligence be found within the state* the person who has custody of the remains may require the coroner of the county where the decedent resided at the time of death to take possession of the remains and the coroner shall inter the remains in the manner provided for the interment of indigent dead.

As previously mentioned, respondent argued in support of its Motion for Judgment on the Pleadings that Health and Safety Code section 7104 bars

appellants from any recovery on the complaint. This assertion was based upon various extrinsic evidence respondent introduced in support if its motion that appellants are out of state residents, rather than any defect in the complaint as pleaded. (CT 11)

Section 7104 does not bar recovery under any of legal theory pleaded. Section 7104 does not specifically abrogate the other statutory or common law rights of appellants or obligations of respondent previously discussed, nor is there any indication such inference should be drawn. The section simply requires respondent to make a reasonably diligent search within the state for decedent's next of kin. Appellants contend that respondent did not make such a search and, had respondent made such a search appellants would have been notified, or the wishes of decedent would have been discovered, or both. This is a factual issue. To the extent this was not sufficiently alleged in the complaint (CT 3, ¶8), this fact would have been alleged had leave to amend be granted. Evidence on this issue was offered, even though this was a motion for judgment the pleadings rather than a summary judgment motion. (ACT 6 - 7, 10)

Respondent is not protected by H & S C §7104 for another reason. Appellants made an offer of proof at the hearing on the motion for judgment on the pleadings to the effect that the decedent was known to the respondent to be a veteran, that a letter was sent to the Veteran's Administration Regional Office by

respondent giving notice of the fact of death and request burial information, respondent had the decedent's correct social security number but nevertheless sent in a wrong social security number. Furthermore, the Veteran's Administration requested additional information. Respondent *ignored* the request for additional information, failed to notify the Veteran's Administration of the *correct* social security number of decedent and ordered decedent cremated. (ACT 10; RT 8, ln. 28 - RT 9, lns. 1 - 14) *Once respondent undertook to notify anyone, it had an absolute duty to do so in a non-negligent manner.* As the Supreme Court clearly stated in ***Williams v. State of California*** (1983) 34 Cal.3d 18 at page 24:

> . . . when the state, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization. [Citations.] The breach of duty may be an affirmative act which places the person in peril or increases the risk of harm . . . . The negligence may also constitute an omission or failure to act . . . .

In *Bock v. County of Los Angeles* (1983) 150 Cal.App.3d 65, the plaintiff widow attempted to plead an action for purely emotional distress, allegedly caused by the county coroner's negligent failure to identify the decedent's body and to notify her. The defendant county's demurrer was sustained without leave to amend. The court reversed the judgment of dismissal, to afford the plaintiff the opportunity to amend. Then, after concluding that no statutory duty to the plaintiff had been

breached, the court opined that the plaintiff might be able to state a cause of action based on the voluntary assumption of a duty by the coroner. *Ibid*, at 72 - 73):

> Under the allegations of the complaint, it can be implied that the county undertook to assist the plaintiff. If it did so, it was obligated to act in a careful and reasonably diligent manner in carrying out the duties it assumed.

2. EXTRINSIC EVIDENCE CANNOT BE CONSIDERED IN A MOTION FOR JUDGMENT ON THE PLEADINGS FOR THE PURPOSE OF PROVING OR DISPROVING ALLEGATIONS IN THE COMPLAINT.

In *Columbia Casualty Company v. Northwestern National Insurance Company* (1991) 231 Cal.App.3d 457, the Court of Appeals held that in a motion for judgment on the pleadings, unlike a summary judgment motion, it is improper for the judge to consider discovery admissions and other extrinsic evidence controverting the pleadings. In that case, Columbia appealed from a judgment of dismissal entered after the trial court granted Northwestern's motion for judgment on the pleadings on Columbia's cross-complaint. The Court of Appeal, in reversing the judgment, emphasized the distinction between a motion for judgment on the pleadings and a motion for summary judgment:

> In a motion for summary judgment, judicial notice or an evidentiary admission or concession by the pleader/adversary can support the motion and thrust the burden on

> the pleader to come forward with facts in rebuttal. In contrast, in order for judicial notice to support a motion for judgment on the pleadings by negating an express allegation of the pleading, the notice must be of something that cannot reasonably be controverted. [citations omitted] The same is true of evidentiary admissions or concessions.
>
> The contrasting treatment of writings incorporated by reference which vary from express allegations of the pleading and the distinction in impact of judicial notice and evidentiary admissions or concessions in motions for summary judgment and motions for judgment on the pleadings does not rest on mere technicalities of pleading and procedure. Rather it is rooted in the demand of due process that a party be given "notice and opportunity for hearing appropriate to the nature of the case." [citations omitted]

Ibid. at p. 468.

In the instant matter it is patently unfair that respondent be permitted to bring a motion for summary judgment, under the guise of a motion for judgment on the pleadings, only days before trial without according appellants any of the procedural safeguards of a summary judgment motion and at the same time not according appellants leave to amend.

3. A MOTION FOR JUDGMENT ON THE PLEADINGS CANNOT BE MADE AFTER ENTRY OF A PRETRIAL CONFERENCE ORDER OR 30 DAYS BEFORE THE INITIAL TRIAL DATE, WHICHEVER IS LATER

Code of Civil Procedure section 438(e) provides:

> (e) No motion may be made pursuant to this section if a pretrial conference order has been entered pursuant to Section 575, or within 30 days of the date the action is initially set for trial, whichever is later, unless the court otherwise permits.

As stated earlier, the Motion for Judgment on the Pleadings was filed on February 17, 1993, *some 304 days after the initial trial setting.* (ACT 1 and CT 6) Notwithstanding this clear violation of a specific time standard, such unexcused delay in attacking an allegedly defective pleading is said be "bad practice." See, *e.g.*, *Gallagher v. California Pac. T. & T. Co.* (1936) 13 Cal.App.2d 482, 486.

B. APPELLANTS' REQUEST FOR LEAVE TO AMEND SHOULD HAVE BEEN GRANTED.

Appellants requested leave to amend, the complaint had not been previously amended, and appellants made a clear offer of proof as to at least some of the additional facts that would be alleged in an amended pleading.

1. THERE HAS LONG BEEN ESTABLISHED A LIBERAL POLICY FAVORING AMENDMENT OF A PLEADING

Trial courts are vested with the discretion to allow amendments to pleadings "in furtherance of justice." Code Civ. Proc., §473. "That trial courts are to liberally permit such amendments, at any stage of the proceedings, has been established policy in this state since 1901. *[citations omitted]*" *Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 488-489. This rule rests on the fundamental policy that "cases should be decided on their merits." *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 585.

The general rule allows great liberality at all stages of the proceeding in permitting the amendment of pleadings in order to dispose of cases upon their merits. *Dunzweiler v. Superior Court* (1968) 267 Cal.App.2d 569, 576.

It has been said that "leave [to amend] is routinely granted" after granting a motion for judgment on the pleadings. *Weil & Brown*, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, ¶7.222.1.

In *Maclsaac v. Pozzo* (1945) 26 Cal.2d 809, the Supreme Court of California noted that "the granting of the motion without leave to amend would in many cases be an absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits." (*Id.*, at p. 816.)

2. IT IS AN ABUSE OF DISCRETION TO DENY LEAVE TO AMEND WHEN NO FAIR, EARLIER OPPORTUNITY WAS GIVEN TO CORRECT THE DEFECTS IN THE PLEADING.

In *Rita Nelson v. Robert C. Nevel* (1984) 154 Cal.App.3d 132 it was held to be an abuse of discretion to deny appellant an opportunity to amend where respondent delayed bringing his general demurrer until the day of trial. In this matter, respondent filed its motion only 25 days before trial and the motion was heard only 18 days before trial. (CT 6 and 58)

"Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance where, as here, a fair prior opportunity to correct the substantive defect has not been given." *Von Batsch v. American Dist. Telegraph Co.* (1985) 175 Cal.App.3d 1111, 1119: see also, *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 778-779 [appellant need not necessarily show how complaint would have been amended if leave had been granted where there had been no prior opportunity to amend].

IV. CONCLUSION

The motion for judgment on the pleadings should not have been granted. Appellants stated a cause of action under numerous theories, both statutory and common law. Respondent failed to make either a reasonable or dilligent effort to notify appellants of the death of their son. Respondent made no reasonable effort to ascertain the wishes of the decedent or his next of kin with respect to the interment of the decedent's remains. Respondent negligently made a single effort to ascertain decedent's next-of-kin, and as a direct result of its negligence failed to give any notice to anyone which would have resulted in respectful and humane interment. Finally, respondent failed to follow up on a request for additional information which would have resulted in notice.

Respondent has never contended it had a compelling need for such a hasty disposition of the decedent's remains. To perform its duties properly, it would have never had to set foot outside the State. A minimal effort would have been sufficient.

It is a denial of due process to have allowed the motion to be made so near to trial, based on a technical objection. It is an especially unfair denial of due process to have sustained the motion on extraneous "evidence."

Finally, the motion should not have been granted without leave to amend. No previous opportunity was given to amend the complaint. The parents of a veteran of the armed forces of the United States have suffered a wrong. If this Court

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 205 So. Broadway, Suite 907, Los Angeles, California 90012. On _____, I served the foregoing document described as **PLAINTIFF-APPELLANTS' PETITION FOR REVIEW** in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows

Martin Roy Robles
MARTIN ROY ROBLES & ASSOCIATES
2120 Huntington Drive
South Pasadena, California 91030

Judge Joe Kalin
LOS ANGELES SUPERIOR COURT
Department 55
111 N. Hill Street
Los Angeles, CA 90012

COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE
300 S. Spring Street
Los Angeles, CA 90013

personal service 7/12/96 ec.

[X] (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail. Executed on 7/12/96, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.